DATO' SIVANANTHAN SHANMUGAM v. ARTISAN FOKUS SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-994-06-2014]
26 DECEMBER 2014

CIVIL PROCEDURE: *Res judicata – Estoppel – Parties entered shareholders' agreement for joint venture agreement – Clause in shareholders' agreement that respondent required to refund deposit to appellant – Joint venture agreement did not materialise despite having paid deposit – Shareholder of respondent obtained summary judgment from another company privy to agreement for deposit in one suit – Summary judgment entered against appellant for refusing to refund deposit in another suit – Whether respondent had cause of action against appellant – Whether respondent estopped from recovering judgment by reason of judgment previously obtained in another suit – Whether there was abuse of process of court*

CIVIL PROCEDURE: *Estoppel – Judgment in previous suit – Parties entered shareholders' agreement for joint venture agreement – Clause in shareholders' agreement that respondent required to refund deposit to appellant – Joint venture agreement did not materialise despite having paid deposit – Shareholder of respondent obtained refund of deposit from another company privy to agreement through summary judgment – Summary judgment entered against appellant for refusing to refund deposit in another suit – Whether respondent estopped from recovering judgment by reason of judgment previously obtained in another suit – Whether there was abuse of process of the court*

The appellant and one Dato' Paduka Khairuddin ('KAH') had negotiated with Lembaga Pembangunan Perumahan dan Bandar Sabah ('LPPB') with a view of securing a joint venture agreement ('JVA') between LPPB and the respondent to develop a land owned by LPPB into a housing project where the respondent would be appointed as the sole developer. The appellant, KAH, the respondent and two shareholders and directors of the respondent, Datuk Hoe ('HTF') and Lee Fuei Siong ('LFS') entered into a shareholders' agreement ('the agreement'). The agreement, by virtue of cl. 2.1, expressed to be conditional upon execution of the JVA between LPPB and the respondent. Under cl. 3.2 of the agreement, the respondent was required to pay the sum in dispute to the appellant and KAH and/or its nominee, Cosmotine Sdn Bhd ('Cosmotine'). Clause 2.1 further stipulated that if the JVA was not executed in the manner prescribed by cl. 3.2, both the appellant and KAH were required to refund the respondent the refundable deposit. Following the execution of the agreement, HTF paid Cosmotine a sum of RM2.3 million being the refundable sum ('the said sum'). In return, Cosmotine deposited the same amount with HTF ('the said cheque'). However, the appellant and KAH failed to secure the JVA between LPPB

and the respondent within the specified period of 14 days from the date of the execution of the agreement. HTF presented the said cheque to the bank for payment but it was dishonoured. Consequently, the respondent demanded the refund of the said sum from the appellant and KAH but no refund was made. In the High Court, HTF obtained summary judgment against Cosmotine for the recovery of the said sum. Meanwhile, the respondent commenced an action against the appellant and KAH in the High Court for the recovery of the said sum. Summary judgment was entered against both the appellant and KAH. However, the present appeal only concerned the appellant as KAH opted not to appeal. The issues that arose in the present appeal were (i) whether the respondent had a cause of action against the appellant; and if there was any actionable cause; (ii) whether the respondent was precluded from recovering judgment in this action by reason of the judgment previously obtained by HTF against Cosmotine in the HTF suit on the basis of the doctrines of estoppel, *res judicata*, merger and election. The respondent argued that even though the HTF suit and the present claim were based on the recovery for the said sum, the former suit was a cheque action based on the Bills of Exchange Act 1949 while the latter suit was premised on the breach of contract when the appellant and KAH allegedly breached the agreement.

Held (allowing appeal)
Per Idrus Harun JCA delivering the judgment of the court:

(1) As the decision in the HTF suit was in the respondent's favour, the sum effect would be that two different entities would be effectively declared by the same court, namely the High Court, as the rightful recipients of the said sum, despite the clear fact that only one payment of the said sum was effected by HTF to Cosmotine and not by the respondent to the appellant and KAH and/to Cosmotine. Two different entities could not, in law and in fact, be declared as being entitled to the said sum. The two judgments could not co-exist in valid and effective force and were really for the same debt as such satisfaction of one would be satisfaction of both. (para 15)

(2) HTF had elected to commence the HTF suit against Cosmotine which ended with the summary judgment being recorded. The continuation of these proceedings against the appellant had clearly violated the doctrine of election. It is trite law that where a person had determined to follow one of his remedies and had communicated it to the other side in such a way as to lead the opposite party to believe that he had made that choice, he had completed his election and could not go further. (para 17)

(3) The facts in the HTF suit and in the present appeal were identical. Whatever forms the two claims were made or described, be it the cheque action or for the breach of contract, the claims were not fundamentally different as it arose from the agreement. There was no real or glaring difference between both cases. There was a mutual or privity of interest between the appellant and Cosmotine in both suits. (para 22)

(4) Since the present appeal would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, the fact that the parties to this suit were different from the HTF suit did not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from re-litigating a specific issue that had been decided in the prior separate action. It would be unjust to permit the respondent to make double claims by filing two separate actions for the same relief. The present appeal was an abuse of the process of court. (paras 25 & 28)

(5) The appellant's obligation to repay the respondent in accordance with the terms of the agreement would only arise if the sum was indeed paid by the respondent. The appellant was under no obligation under the agreement to repay the sum if the same was paid by any other party including HTF. Under the circumstances, such an obligation ought not to be imposed by the court. (para 32)

(6) The High Court Judge had fallen into error when Her Ladyship said that the respondent's cause of action was based on the appellant's breach of the agreement and proceeded to enter judgment against the appellant. It was abundantly clear that a judgment had already been obtained by HTF against Cosmotine in respect of the said sum. The respondent was also claiming for the same sum in respect of which the respondent had not been able to prove that it had suffered any loss or damage. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan seorang yang dikenali sebagai Dato' Paduka Khairuddin ('KAH') telah berunding dengan Lembaga Pembangunan Perumahan dan Bandar Sabah ('LPPB') dengan harapan untuk mendapatkan satu perjanjian usahasama ('PU') antara LPPB dengan responden untuk membangunkan sebidang tanah yang dimiliki oleh LPPB menjadi satu projek perumahan di mana responden akan dilantik sebagai satu-satunya pemaju. Perayu, KAH, responden dan dua orang pemegang saham dan pengarah responden, Datuk Hoe ('HTF') dan Lee Fuei Siong ('LFS') memeterai satu perjanjian pemegang-pemegang saham ('perjanjian tersebut'). Perjanjian tersebut, menerusi kl. 2.1, dinyatakan sebagai bersyarat dengan meterainya PU antara LPPB dengan responden. Di bawah kl. 3.2 perjanjian, responden perlu membayar jumlah yang dipertikaikan kepada perayu dan KAH dan/atau penamanya, Cosmotine Sdn Bhd ('Cosmotine'). Klausa 2.1 seterusnya menyatakan bahawa sekiranya PU tidak dimeterai dengan cara yang dinyatakan oleh kl. 3.2, kedua-dua perayu dan KAH perlu memulangkan semula deposit yang boleh dikembalikan. Berikutan meterainya perjanjian tersebut, HTF membayar Cosmotine sejumlah RM2.3 juta iaitu jumlah yang boleh dikembalikan ('jumlah tersebut'). Sebagai balasan, Cosmotine mendepositkan jumlah yang sama kepada HTF ('cek tersebut'). Walau bagaimanapun, perayu dan KAH gagal mendapatkan PU antara LPPB dan

responden dalam tempoh masa yang ditetapkan selama 14 hari dari tarikh meterai perjanjian. HTF mengemukakan cek tersebut kepada bank sebagai bayaran namun ia ditendang. Akibatnya, responden memohon penghakiman terus terhadap Cosmotine untuk mendapatkan semula jumlah tersebut. Sementara itu, responden memulakan satu tindakan terhadap perayu dan KAH di Mahkamah Tinggi untuk mendapatkan semula jumlah tersebut. Penghakiman terus direkodkan terhadap kedua-dua perayu dan KAH. Walau bagaimanapun, rayuan ini hanyalah berkenaan perayu sahaja kerana KAH memilih untuk tidak merayu. Isu-isu yang berbangkit dalam rayuan ini adalah (i) sama ada responden mempunyai kausa tindakan terhadap perayu; dan jika terdapat kausa tindakan; (ii) sama ada responden dikecualikan daripada mendapat penghakiman dalam tindakan ini atas sebab penghakiman yang terdahulu yang diperoleh HTF terhadap Cosmotine dalam guaman HTF atas dasar doktrin estoppel, *res judicata*, penggabungan dan pemilihan. Responden menghujahkan bahawa walaupun guaman HTF dan tuntutan ini adalah berdasarkan pemerolehan semula jumlah tersebut, guaman terdahulu adalah tindakan berdasarkan cek di bawah Akta Pertukaran Bil 1949 manakala guaman ini berdasarkan pemecahan kontrak apabila perayu dan KAH didakwa melanggar perjanjian.

Diputuskan (membenarkan rayuan)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana keputusan dalam guaman HTF berpihak kepada responden, kesan terjumlah adalah bahawa dua entiti berbeza akan secara efektifnya diisytiharkan oleh mahkamah yang sama, khasnya Mahkamah Tinggi, sebagai penerima-penerima yang berhak ke atas jumlah tersebut walaupun fakta jelas bahawa hanya satu bayaran jumlah tersebut yang dilaksanakan oleh HTF kepada Cosmotine dan bukan responden kepada perayu dan KAH dan/kepada Cosmotine. Dua entiti berbeza tidak boleh, secara undang-undang dan fakta, diisytiharkan sebagai berhak ke atas jumlah tersebut. Kedua-dua penghakiman tidak boleh wujud bersama-sama dengan sah dah efektif dan bagi hutang yang sama kerana penyelesaian yang satu adalah penyelesaian bagi kedua-dua sekali.

(2) HTF memilih untuk memulakan guaman HTF terhadap Cosmotine yang mana berakhir dengan rekod penghakiman terus. Kesinambungan prosiding-prodiding ini terhadap perayu jelas melanggar doktrin pemilihan. Adalah undang-undang matan bahawa sekiranya seseorang itu telah memutuskan untuk menuruti salah satu remedinya dan telah menyatakan kepada pihak yang satu lagi dalam cara yang membuatkan pihak yang satu lagi percaya bahawa dia telah membuat pilihan tersebut, dia telah menyempurnakan pemilihannya dan tidak boleh meneruskan lagi.

(3) Fakta-fakta dalam guaman HTF dan dalam rayuan ini adalah serupa. Apa jua bentuk tuntutan dibuat atau diperihalkan, sama ada tindakan cek atau bagi pemecahan kontrak, tuntutan-tuntutan tersebut tidak, pada

asasnya, berbeza kerana ia berbangkit daripada perjanjian itu. Tiada perbezaan sebenar atau ketara antara kedua-dua kes. Terdapat kepentingan bersama atau priviti antara perayu dan Cosmotine dalam kedua-dua guaman.

(4) Oleh kerana rayuan ini sudah pasti akan melibatkan penelitian fakta yang sama seperti dalam guaman HTF yang terdahulu dan menerima pakai pendekatan dan maksud *res judicata* dengan lebih luas sebagai kedudukan yang diutamakan dan betul, fakta bahawa pihak-pihak dalam guaman ini berbeza dengan guaman HTF tidak menghilangkan hak perayu untuk membangkitkan doktrin isu estoppel untuk menghalang responden daripada membicarakan semula isu khusus yang telah diputuskan dalam tindakan asing terdahulu. Adalah tidak adil untuk membenarkan responden membuat tuntutan berganda dengan memfailkan dua tindakan berasingan bagi relief yang sama. Rayuan ini adalah satu salah guna proses mahkamah.

(5) Kewajipan perayu untuk membayar semula responden selaras dengan terma perjanjian akan berbangkit sekiranya jumlah tersebut telah dibayar oleh responden. Perayu tidak berkewajipan di bawah perjanjian untuk membayar semula jumlah tersebut sekiranya ia telah dibayar oleh pihak lain termasuk HTF. Berdasarkan hal keadaan, kewajipan sedemikian tidak wajar dikenakan oleh mahkamah.

(6) Hakim Mahkamah Tinggi telah terkhilaf apabila beliau memutuskan bahawa kausa tindakan responden adalah berdasarkan pelanggaran perjanjian oleh perayu dan terus merekodkan penghakiman terhadap perayu. Adalah amat jelas bahawa penghakiman telah diperoleh oleh HTF terhadap Cosmotine berkenaan jumlah tersebut. Responden juga menuntut jumlah yang sama dalam mana responden tidak dapat membuktikan bahawa ia telah mengalami kerugian atau kerosakan.

Case(s) referred to:

Arnold v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Benjamin Scarf v. Alfred George Jardine (1881-82) 7 Appeal Cases 345 ***(refd)***

Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***

BP Malaysia Sdn Bhd v. Zabedah Mohamed & Ors [2007] 8 CLJ 245 HC ***(refd)***

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***

Firm Of RMKRM v. Firm Of MRMVL [1926] AC 761 ***(refd)***

Korso Finance Establishment Anstalt v. John Wedge (Transcript No: 14-387) (unreported) ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 548 ***(refd)***

OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

A *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC* ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Superintendent Of Pudu Prison & Ors v Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***

B *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC* ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 14A

C *For the appellant - Satish Nair (R Kathir with him); M/s Satish Alli & Assocs*
For the respondent - Lua Ai Siew (Elyazura Md Shaarani with her); M/s Soo Thien Ming & Nashrah

[Editor's note: For the High Court judgment, please see Artisan Fokus Sdn Bhd v. Dato' Sivananthan Shanmugam & Anor [2013] 1 LNS 225.]

D *Reported by Najib Tamby*

JUDGMENT

Idrus Harun JCA:

E **[1]** Lembaga Pembangunan Perumahan Dan Bandar Sabah ('LPPB') owned a piece of land situated at Taman Bukit Sepanggar, Jalan Sepanggar, Kota Kinabalu, Sabah ('the said land'). The appellant and one Dato' Paduka Khairuddin Abu Hassan ('KAH') negotiated with LPPB with a view to securing a joint venture agreement ('the JV agreement') between LPPB and
F the respondent to develop the said land into a housing project ('the project') wherein the respondent would be appointed the sole developer for the project.

[2] It resulted in due course in a shareholders' agreement ('the agreement') dated 27 April 2011 entered into by the appellant (referred to in the
G agreement as "SS"), KAH, the respondent, Datuk Hoe Tze Fook ('HTF') and Lee Fuei Siong ('LFS') both of whom were the shareholders and directors of the respondent.

[3] The agreement is, by virtue of cl. 2.1, expressed to be conditional upon execution of the JV agreement between LPPB and the respondent. By
H cl. 3.2, the parties to the agreement agreed with the following stipulation:

> 3.2 The Company agree and undertake with SS & KAH that it shall pay a sum of Ringgit Malaysia Three Million Six Hundred Thousand (RM3,600,000.00) only being consultancy and facilitation of the services rendered as defined herein (hereinafter referred to as "the Consultation
I Fee") to SS and KAH in the following manner.
>
> (a) A Sum of Ringgit Malaysia Two Million One Hundred Thousand (RM2,100,000.00) only (hereinafter referred to as "Refundable Deposit") is now or heretofore paid to SS and KAH and/or its

> nominee or assign, COSMOTINE SDN. BHD. (Co. No: 849014-H) a company incorporated in Malaysia and having its principal place of business at No. 14, Jalan Pandan 7/2, Pandan Jaya, 55100 Kuala Lumpur (hereinafter referred to as "the Party A's Nominee (the receipt of which Party A hereby expressly acknowledged) by the Company being a Refundable Deposit which sum shall be refunded by SS and KAH to the Company in the event the Joint Venture Agreement between LPPB and the Company is not executed within fourteen (14) days from the date of this Agreement.

[4] It is to be noted that cl. 2.1 of the agreement also contains a similar stipulation that if the JV agreement was not executed in the above stipulated manner, both the appellant and KAH were required to refund to the respondent the refundable deposit forthwith.

[5] Following the execution of the agreement, HTF paid Cosmotine Sdn Bhd ('Cosmotine') a sum of RM2,300,000 being the refundable deposit comprising RM2.1 million and an additional sum of RM200,000. In return, Cosmotine deposited its CIMB Bank Bhd cheque bearing No. 119674 post dated to 30 December 2011 in the same amount ('the said cheque') with HTF. However, nothing turned out the way it was expected. The appellant and KAH failed to secure the JV agreement between LPPB and the respondent within the specified period of 14 days from the date of the execution of the agreement. HTF thereupon presented the said cheque to the bank for payment on 31 January 2012 but was dishonoured. In consequence of that, the respondent demanded the refund of the sum of RM 2.3 million from the appellant and KAH. However, no refund of the sum was made by the appellant and KAH.

[6] In the event, on 28 August 2012, HTF commenced an action against Cosmotine at the Kuala Lumpur High Court *vide* Writ No. 22 NCVC-1009-08-2012 ('the HTF suit') for the recovery of the sum of RM2.3 million, interest at 5% per annum thereon and costs. HTF next proceeded with an application for leave to enter summary judgment against Cosmotine which was allowed by the learned High Court Judge on 6 December 2012. No appeal was lodged by Cosmotine against the said decision.

[7] The respondent meanwhile, commenced the present action against the appellant as the first defendant and KAH as the second defendant on 16 August 2012 for the recovery of the sum of RM2.3 million, interest of 8% per annum thereon, costs and such further and other order and relief as the court deems just and fit. On 20 May 2013 a summary judgment was entered against KAH. He did not appeal.

[8] As regards the action against the appellant, the respondent, on 5 December 2013, applied before the High Court for a question of law to be determined pursuant to O. 14A of the Rules of Court 2012. The questions proposed were in the following manner:

a. That the following questions of law be determined:

whether in view of the cheque action taken out by Hoe Tze Fook against Cosmotine pursuant to KLHC Suit No. 22 NCVC-1009-08/ 2012 and the judgment entered against the said Cosmotine Sdn Bhd in the said action, the plaintiff's cause of action against the 1st defendant is prohibited by the principle of estoppel, *res judicata* and doctrine of merger of cause of action.

b. Further, if the answer to the aforesaid questions of law is answered in favour of the plaintiff, plaintiff be at liberty to enter judgment against the 1st defendant for the following:

i. The sum of RM2,300,000.00;

ii. Interest thereon at the rate of 8% per annum from 13.1.2012 to the date of full payment; and

iii. Costs of this application including the costs of this action.

The learned High Court Judge answered the questions posed in the negative and proceeded to enter judgment against the appellant for the sum claimed and interest at the rate of 8% per annum from 13 January 2013 and 5% per annum from 1 May 2014 to the date of payment and costs. The appellant appeals against the said decision.

[9] Order 14A of the Rules of Court 2012 reads as follows:

Determination of questions of law or construction

1. (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire course on matter or any claim on issue therein.

(2) On such determination the Court may dismiss the course or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.

Manner in which applications under rule 1 may be made

2. An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

[10] It is obvious that the power of the court under this order is discretionary, as clearly evident by the use of the word 'may' therein. The power, in our opinion, is only exercisable where the determination of any such question of law or construction of any document, as the case may be, appears to the court to be suitable without the full trial of the action and will finally determine the entire cause or matter or any claim or issue in such action. This is a required prior condition or a prerequisite which must be fulfilled before this order can be invoked. The court should not, as a matter of course, proceed to determine any such question without first considering the legal prerequisite in this order. In a nutshell, the conditions prescribed in r. 1 are not that can be conveniently avoided or sidestepped.

[11] In *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 the Court of Appeal followed the principles established in foreign cases decided on the equivalent of our O. 14A. One such case is *Korso Finance Establishment Anstalt v. John Wedge* (unreported) 15 February 1994, CA Transcript No. 14/387 where the English Court of Appeal amongst others said that if a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue. The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.

[12] The *Malaysia High Court Practice, High Court*, MLJ 2004 at para. 14A.1.3 clearly states that the test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action (see also *BP Malaysia Sdn Bhd v. Zabedah Mohamed & Ors* [2007] 8 CLJ 245).

[13] Having stated the law governing an application under O. 14A of the Rules of Court 2012, it is perhaps convenient to mention briefly at this point the learned judge's decision in the court below. In Her Ladyship's judgment the learned judge held that the cause of action here was based on a breach of contract. The subject matter in this action is the shareholders' agreement but in the HTF suit the subject matter is the cheque and the rights and obligations of the drawer and the drawee of the cheque. The respondent instituted this suit by acting on its own rights. It is not acting as the privy of HTF. Similarly, in the HTF suit, HTF instituted the cheque action as the payee of the cheque. He did not sue Cosmotine as the respondent's privy. The respondent is entitled to bring successive actions in respect of the same circumstances which give rise to two different causes of action. The respondent's cause of action against the appellant is not prohibited by the principle of estoppel, *res judicata* and doctrine of merger of cause of action.

[14] Before this court, for the appellant it was contended that the respondent had no cause of action against him and even if there was any actionable cause, which he denied, the respondent's cause of action against the appellant was prohibited by the principles of estoppel and *res judicata* as well as the doctrines of merger and election. We pause to observe that the appellant has never resiled from this line of defence right from the commencement of this suit until the instant appeal as clearly reflected in his statement of defence, the affidavits filed in relation to the O. 14A application and his memorandum of appeal. A question has therefore arisen in consequence of the commencement of the present action, which is whether the respondent is precluded from recovering judgment in this action by reason of the judgment previously obtained by HTF against Cosmotine in the HTF suit on the basis of the doctrines of estoppel, *res judicata*, merger and election.

[15] It is the appellant's case that pursuant to the agreement, only a single payment in the sum of RM2.3 million was paid and the said sum was paid by HTF to Cosmotine. The respondent however, did not pay any sum to the appellant and KAH and/or Cosmotine as stipulated in the agreement. Therefore when the respondent commenced this action against the appellant, the sum effect would be that two different entities would be claiming for the said sum of RM2.3 million and effectively declared by the court as rightful recipients of the money. The reasoning assumes, as we understand it, that two different entities cannot be entitled to claim for the same subject matter. We are satisfied in this regard, that the respondent did not dispute that only a single payment of RM2.3 million was paid and that it was paid by HTF to Cosmotine. The High Court in the HTF suit eventually ordered that the party responsible to repay the said sum of RM2.3 million was Cosmotine and the party entitled to receive the said sum was HTF as set out in the summary judgment. Now, in the present action, the claim is directed against the appellant. The respondent is claiming the same sum of RM2.3 million from the appellant which is the subject matter of the HTF suit. Obviously this is contrary to the clear terms of the summary judgment. We agree with learned counsel for the appellant that as the decision in the HTF suit was in the respondent's favour, the sum effect would be that two different entities would be effectively declared by the same court, that is to say the Kuala Lumpur High Court, as the rightful recipients of the said sum of RM2.3 million despite the clear fact that only one payment of the said sum was effected by HTF to Cosmotine and not by the respondent to the appellant and KAH and/or to Cosmotine. In other words two different entities cannot in law and in fact be declared as being entitled to the said sum of RM2.3 million. The two judgments, in our considered view, cannot co-exist in valid and effective force, and are really for the same debt as such satisfaction of one is, or would be, satisfaction of both.

[16] In *Firm Of RMKRM v. Firm Of MRMVL* [1926] AC 761 which was an appeal from the judgment of the Supreme Court of the Straits Settlements, the Privy Council held that a subsequent suit for the same debt against the firm itself was barred. Lord Atkinson delivering the judgment of the Privy Council said:

> The two judgments which were signed in suits No. 120 and No. 550 were both based on the same cause of action, one directed against the agent of a firm and the other against the firm itself, and cannot in law co-exist in valid and effective force ... . Again, if an action were brought and judgment recovered against the agent, then the agent would have a right of action for indemnity against his principal, while if the principal was liable also to be sued he would be vexed with a double action. They might not necessarily be for the same amounts, and there might be recoveries had or liens and charges created by means of both, and there be no record on the face of the judgments, or any means short of a fresh proceeding, of showing that the judgments were really for the same debt or cause of action, and that satisfaction of one was or would be satisfaction of both.

[17] HTF had elected to commence the HTF suit against Cosmotine which ended with the summary judgment being recorded. The continuation of these proceedings against the appellant has clearly violated the doctrine of election, the concept which is ingrained in our legal system and common law that an individual can either opt for the choice of remedies or relinquish it. It is trite law and, indeed, a fundamental tenet of law that where a person has determined to follow one of his remedies and has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further (see the House of Lords decision in *Benjamin Scarf v. Alfred George Jardine* (1881-82) 7 Appeal Cases 345).

[18] The options which were available to HTF and the respondent were either:

(a) an action by the respondent against the appellant and KAH for the purported breach of the agreement as in the present appeal; or

(b) an action in the HTF suit by HTF against Cosmotine following the dishonour of the cheque,

for the recovery of the sum of RM2.3 million. The respondent should go no further after the summary judgment was recorded as that was the choice for remedies it had made. It should not be allowed to make a further claim for the said sum based on the breach of contract, a remedy from which it is precluded by virtue of the election.

[19] The next point raises questions which concern the issue of the application of the doctrine of estoppel and *res judicata* to the present appeal. In fact the substantial part of the argument before us turned on this critical issue which in our view will ultimately determine this appeal. The terms '*res judicata*', 'issue estoppel' and 'cause of action estoppel' are sometimes used

loosely but the modern tendency has been to use *res judicata* comprehensively to cover all those terms of estoppel (see *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 548 and *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534). *Res judicata* simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatam*. The *res judicata* rule dictates that when a matter between two parties has been adjudicated by a court, the matter may not be pursued further by the same parties and their privies because the judgment becomes the truth between such parties, its application produces finality in litigation and one ought not to be vexed twice for the same cause of action. Since a *res judicata* creates an estoppel *per rem judicatam*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatam* (see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189).

[20] The plea of *res judicata* comprises two distinct forms of estoppel that is to say, cause of action estoppel and issue estoppel. Drake J in *North West Water Ltd v. Binnie & Partners (a firm), supra* stated that cause of action estoppel was confined to cases where the cause of action and the parties were the same in the second suit as they were in the first suit. In such a case the bar is absolute (*OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd, supra*). On the other hand, issue estoppel would involve going over precisely the same issue or point already decided in the first action or refer to an issue that has been previously litigated and determined between the same parties and the same issue is raised in a subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen the issue. The High Court decision in *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; [2010] 8 MLJ 57 clearly shows that the requirements of issue estoppel are that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised and that the same question had been decided. In *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd, supra* the Supreme Court succinctly explained that the term 'issue estoppel' literally meant simply an issue which a party was stopped from raising in subsequent proceeding. Issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action (see also *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491).

[21] A pertinent question which may inevitably be asked is whether there is any limit which should be put on the application of the doctrine of issue estoppel. We raise this question because, contrary to the above requirement that the parties to the judicial decision are the same persons as to the parties to the proceedings in which the issue estoppel is raised, the parties in this appeal are completely different from the parties in the HTF suit.

[22] Having said that, we digress at this point from the above question to consider the nature of the claims in, and circumstances leading to the HTF suit and the present action and thus the plea of *res judicata* and estoppel. We

will return later to the above question. The HTF suit according to the respondent, is a cheque action based on the Bills of Exchange Act 1955. The claim arose when the cheque dated 30 December 2011, issued for the sum of RM2.3 million to HTF by Cosmotine was dishonoured. The present claim by the respondent against the appellant, on the other hand, was also for the recovery of the said sum but premised on the breach of contract when the appellant and KAH were alleged to have breached the agreement. Clearly the two actions were based on two different causes of action. However, upon careful study of the statement of defence of Cosmotine in the HTF suit and the affidavits in relation to HTF's application to enter summary judgment in respect of the HTF's suit, we have no hesitation in holding that the facts in that case and in the present appeal are identical. Thus in whatever forms the two claims are made or described, be it the cheque action or for the breach of contract, the claims are not fundamentally different as it arose from the agreement where the sum of RM2.3 million was purportedly to have been paid by HTF to Cosmotine, pursuant to the agreement for the purpose which we have dealt at the beginning of our judgment and when the JV agreement failed to materialise, HTF presented the cheque to the bank for payment but was dishonoured. Since the demand for the refund was not met by Cosmotine, HTF commenced the action against Cosmotine while the respondent commenced the action against the appellant and KAH. Both suits claimed for the same amount of money to be paid by Cosmotine in the HTF suit and the appellant and KAH in the present action. It is manifestly clear therefore, that both cases arose from the same set of facts, background, issues and circumstances while the reliefs claimed are consequent to the agreement. On the contrary, we do not detect any real or glaring difference in both cases. There is indeed a mutual or privity of interest between the appellant and Cosmotine in both civil suits. Furthermore, both cases involved same witnesses and same set of documents.

[23] Now reverting to the question we raised above, it is important to ask whether it is an inflexible rule that the parties to the judicial decision must be the same persons as the parties to the proceedings in which the estoppel is raised. Before stating our answer to this question consideration of the local and foreign authorities is necessary.

[24] In *North West Water Ltd v. Binnie & Partners (a firm), supra*, three defendants namely the consultant engineers, the water authority and the contractors were sued for negligence but only the consultant engineers were wholly found to be negligent. In subsequent separate proceedings where the water authority issued proceedings against the consultant engineers based on contract and negligence to recover damages, the court stated that consideration of the authorities reveal two schools of thought on the issue of the limits which should be put on the application of the doctrine of estoppel. One approach was called the broad one which held that the true test of an issue estoppel was whether for all practical purposes the party seeking to put forward some issue had already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions were

different. The conflicting approach was to confine issue estoppel to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies. Drake J in preferring the broader approach to a plea of issue estoppel said:

> In my judgment, this broader approach to a plea of issue estoppel is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action.

[25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur, supra*).

[26] We would emphasise at this juncture that the present action could have been included in the HTF suit by reason of the fact that the relief, evidence relied on and the witnesses are the same. In truth, the claims and relief sought in both suits share one common object which is the refund of RM2.3 million from Cosmotine, the appellant and KAH which amount became liable to be refunded as a result of the alleged breach of the agreement. The only difference lies in the cause of action.

[27] In *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur, supra* the High Court held that although the cause of action in the instance case was for breach of contract of the said agreement and the cause of action in the first civil suit was for negligence, the fact remained and admittedly, the relief claimed was for the same and in respect of the same subject matter and consequent to the same agreement. Further the witnesses who had been called in the first civil suit and the present suit and the document produced were the same. Therefore it would

be most unjust to permit the plaintiff to make a double claim arising out of the same transaction and this would amount to abusing the process of the court, was frivolous and scandalous as the claim was wholly unnecessary.

[28] Reverting to the instant appeal, what the respondent had done in effect was to divide its case into two separate claims and in the process proceed in two stages in order to suit its convenience while in actuality it was claiming for the same relief based on the same facts for which judgment had already been obtained earlier in the HTF suit. It cannot be denied that both claims arose from the same one and only transaction and were undoubtedly interrelated. Therefore it would be unjust to permit the respondent to make double claim by filing two separate actions for the same relief. In our judgment the instant action is an abuse of the process of the court (see also *North West Water Ltd v. Binnie & Partners (a firm), supra*).

[29] We would further add at this point that, even if there has been no actual decision as to the issues involved in the instant action, but if the respondent did not raise these issues in the earlier proceedings which it could and should have done so, in our view the plea of this doctrine of *res judicata* in its amplified and wider sense is available to the appellant to prevent an abuse of the process of the court. We would refer to the Federal Court decision in *Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256:

> It would suffice in this regard to refer to the judgment of the Privy Council in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v Attorney-General for Queensland* [1979] AC 411 [at p. 425].
>
> > The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
> >
> > > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
> >
> > The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court ...

[30] The present suit as we have said earlier could have been included in the HTF suit and the issue in the present case could have been ventilated there for it to be specifically determined. The respondent chose not to do so and it is now estopped from coming to the court to seek to raise the issue which might have been put but was not raised in the HTF suit at their option (see *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 and *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93). The plea of *res judicata* in this appeal is, without question, well taken and is supported by authority. In the end, we have no hesitation in accepting it.

[31] There remains the last issue raised by the appellant that requires our consideration. Based on the statement of defence and the affidavits of the appellant filed in relation to the O. 14A application, it is quite clear that the respondent did not part with a single cent and that the payment of the sum RM2.3 million to Cosmotine was in fact effected by HTF. Both the appellant and the respondent had entered into the agreement agreeing on certain terms. In law, parties are bound by the terms of the contract that they have entered into and likewise in this case, the rights and obligations of the parties are governed by the agreement. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said (see *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 47). The duty of the court is to give effect to the clear intention of the parties as expressed in the agreement. If the words are clear, unambiguous and in unmistakable language, there is very little the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result (*Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337).

[32] The agreement between the respondent and the appellant, KAH, the respondent and HTF is expressed unequivocally and explicitly. Under cl. 3.2 of the agreement, the respondent is required to pay the sum in dispute to the appellant and KAH and/or its nominee Cosmotine. By virtue of cl. 2.1 of the agreement, if the JV agreement is not executed, the appellant and KAH shall, upon demand by the respondent refund the said sum to the respondent forthwith. It is quite clear therefore that the appellant's obligation to repay the respondent in accordance with the terms of the agreement would only arise if the sum was indeed paid by the respondent. The appellant was indeed under no obligation under the agreement to repay the sum if the same was paid by any other party including HTF. Under the circumstances, in our judgment, such an obligation ought not to be imposed by the court.

[33] The learned judge in this regard had fallen into error when Her Ladyship said that the plaintiff's (the respondent in this appeal) cause of action in this action is based on the defendant's (the appellant) breach of the shareholders' agreement and proceeded to enter judgment against the appellant. By doing so the learned judge had disregarded the fact that there was not a shred of evidence to prove that the respondent had suffered any

loss or damage in the sum of RM2.3 million. In fact it was HTF who paid the said sum of RM2.3 million to Cosmotine, obtained the judgment against Cosmotine and enforced the said judgment by obtaining a winding up order against Cosmotine. At no time did HTF subrogate his rights to the respondent or that his rights were assumed by the respondent. The principle of law governing remedies for breach of contract does not allow the respondent to be put in a position better than he would have been if there had been no breach. The victim of a breach is only entitled to compensation for any loss which results from the breach and which is neither too remote nor unlikely. He is to be placed in the same position as if the contract had been performed, he should recover no more than he has lost (see *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777). It is abundantly clear in this case that a judgment had already been obtained by HTF against Cosmotine in respect of the sum of RM2.3 million. The respondent is also claiming for the same sum in respect of which the respondent has not been able to prove that it had suffered any loss or damage. We would refer to Lord Goddard's *dictum* in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 which was followed in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[34] In all the circumstances and for the reasons to which we have alluded, we come to the inevitable conclusion that the respondent's action under consideration in this appeal arises from the same facts and concerns the same amount, although the cause of action is different. However on the facts of the present case, the broader principles of issue estoppel and the wider doctrine of *res judicata* as well as the doctrine of election should apply to preclude the respondent's claim from being proceeded with against the appellant. Further, it must also be emphasised in our conclusion, that an obligation ought not to be imposed on the appellant to pay the respondent when there is no evidence that he had received the payment from the respondent under the agreement and that the respondent had suffered any loss or damage. The question of law framed pursuant to O. 14A of the Rules of Court 2012 is therefore answered in the affirmative in favour of the appellant. The order of the High Court is set aside. We accordingly at the conclusion of the case allow the appeal with global costs here and below of RM30,000 to the appellant and deposit is refunded.